

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CHARLES BERNARD DAVIS, SR.,

Petitioner,

vs.

ERIC ARNOLD, Warden,

Respondent.

Civil 16cv1605-JLS (JMA)
No.

ORDER:

**(1) DENYING AS MOOT
PETITIONER'S MOTION TO
PROCEED IN FORMA PAUPERIS
AND MOTION FOR
APPOINTMENT OF COUNSEL;
and**

**(2) DISMISSING PETITION
FOR A WRIT OF HABEAS
CORPUS WITHOUT PREJUDICE
AS SECOND OR SUCCESSIVE**

Petitioner, a state prisoner proceeding pro se, has filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 challenging his 2007 conviction for three counts of second degree murder in San Diego County Superior Court case No. SCD212083. (ECF No. 1 at 1.) Petitioner has also filed a motion to proceed in forma pauperis and a motion for appointment of counsel. (ECF Nos. 2–3.) The Court summarily **DISMISSES** this case pursuant to 28 U.S.C. § 2244(b)(3)(A) as indicated below. Accordingly, the Court **DENIES AS MOOT** Petitioner's in forma pauperis motion and his motion for appointment of counsel.

1 The instant Petition is not the first Petition for a Writ of Habeas Corpus Petitioner
 2 has submitted to this Court challenging his 2007 conviction in San Diego Superior Court
 3 case No. SCD212083. On February 2, 2010, Petitioner filed in this Court a Petition for
 4 a Writ of Habeas Corpus in Civil Case No. 10cv0359-W (CAB). In that petition,
 5 Petitioner also challenged his conviction in San Diego Superior Court case No.
 6 SCD212083. (*See Davis v. McDonald*, Civ. Case No. 10cv0359-W (CAB), ECF No. 1.)
 7 On March 7, 2011, this Court dismissed the petition for Petitioner's failure to file his
 8 petition within the one-year statute of limitations. (*See Order*, Civ. Case No. 10cv0359-
 9 W (CAB), ECF No. 20.) Petitioner did not appeal that determination.

10 **INSTANT PETITION BARRED BY GATEKEEPER PROVISION**

11 Petitioner is now seeking to challenge the same conviction he challenged in his
 12 prior federal habeas petition. (Pet. at 1.) The prior dismissal of his previous petition for
 13 failure to comply with the one-year statute of limitations renders subsequent petitions
 14 challenging the same conviction or sentence "second or successive" under 2244(b).
 15 *McNabb v. Yates*, 576 F.3d 1028, 1030 (9th Cir. 2009). Unless a petitioner shows he or
 16 she has obtained an Order from the appropriate court of appeals authorizing the district
 17 court to consider a successive petition, the petition may not be filed in the district court.
 18 *See* 28 U.S.C. § 2244(b)(3)(A). Here, there is no indication the Ninth Circuit Court of
 19 Appeals has granted Petitioner leave to file a successive petition.

20 **CONCLUSION AND ORDER**

21 Because there is no indication Petitioner has obtained permission from the Ninth
 22 Circuit Court of Appeals to file a successive petition, this Court cannot consider his
 23 Petition. Accordingly, the Court **DENIES** as moot Petitioner's motion to proceed in
 24 forma pauperis and motion for appointment of counsel and **DISMISSES** this action
 25 without prejudice to Petitioner filing a petition in this court if he obtains the necessary
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1 order from the Ninth Circuit Court of Appeals. ***The Clerk of Court is directed to mail***
2 ***Petitioner a blank Application for Leave to File a Second or Successive Petition or***
3 ***Motion under 28 U.S.C. § 2254 together with a copy of this Order.***

4 **IT IS SO ORDERED.**

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6 DATED: July 11, 2016

7 
8 Honorable Janis L. Sammartino
United States District Judge

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